

United Parcel Service, Inc. and Gayle E. Bozarth,
Case 9-CA-15255

February 8, 1982

DECISION AND ORDER

**BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER**

On July 24, 1981, Administrative Law Judge Robert T. Wallace issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² In adopting the Administrative Law Judge's conclusion that deferral to the decision of the Teamsters/Management arbitration panel concerning Bozarth's discharge is not warranted, Member Jenkins, for the reasons set forth in his dissenting opinion in *Terminal Transport Company, Inc.*, 185 NLRB 672 (1970), would find that the lack of a neutral member on the panel constitutes an independent reason sufficient in itself to render deferral inappropriate in this case.

Member Hunter finds it unnecessary in this case to pass on the Board's decision in *Filmation Associates, Inc.*, 227 NLRB 1721 (1977), since he agrees with his colleagues that, in any event, the complaint herein should be dismissed on the merits.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge: Upon a charge and an amended charge filed by Gayle E. Bozarth on April 28 and June 9, 1980, respectively, a complaint was issued on June 11, 1980, against United Parcel Service, Inc. (herein called Respondent or UPS), alleging that it discharged Bozarth for engaging in concerted activities in furtherance of collective bargaining

and other mutual aid and protection and to discourage membership in the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 957 (herein called the Union), in violation of Section 8(a)(1) and (3) of the Act, and for filing unfair labor practice charges with the Board in Cases 9-CA-14065-1, 9-CA-14578, and 9-CA-14928, in violation of Section 8(a)(4) of the Act.

UPS filed an answer denying the allegations of unlawful conduct and raising, as an affirmative defense under the deferral doctrine set forth in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), a statewide Teamsters/Management arbitration panel's determination, on April 14, 1980, upholding Bozarth's discharge. I find the *Spielberg* doctrine inapplicable here because the complaint includes an allegation of violation of Section 8(a)(4). *Filmation Associates*, 227 NLRB 1721 (1977).

Pursuant to notice, this case was heard at Dayton, Ohio, on February 4, 5, and 10, 1981. Briefs were received from the General Counsel, UPS, and the Charging Party, and they have been carefully considered.

Upon the entire record in this case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

UPS is an Ohio corporation with an office and place of business located at Dayton, Ohio, where it is engaged in the transportation and distribution of parcels. During the year preceding issuance of the complaint herein, it performed interstate freight transportation services valued in excess of \$50,000. During the same period it received gross revenues in excess of \$500,000, as a link in the interstate movement of freight. It is conceded, and I find, that UPS is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters Local 957, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

On March 20, 1980, Bozarth was discharged by UPS purportedly for assaulting his immediate supervisor (Stratton) at a restaurant (Frisch's) in or near Dayton. He denies committing any assault and claims that the sole motivation for the discharge was UPS's desire to get rid of him because of his militancy in pursuing his rights as a member of the Union, including filing unfair labor practice charges.

A. Incident at Frisch's

There are only three witnesses to the alleged incident at Frisch's Restaurant: Bozarth, Pugh, and Stratton. Their versions are as follows:

Bozarth claims he entered the restaurant at approximately 9:10 a.m. on February 29, 1980. It was nearly empty. He had been on sick leave from UPS since January 30 due to work-related back injury. He had arranged to meet a Board investigator there at 9:30 a.m. He sat down, ordered coffee, and began to read a newspaper. Looking up, he was surprised to see Stratton and another UPS driver (Pugh) seated off to his side one or two booths away.¹ He then "exercised freedom of speech" and called out to Pugh that "Stratton was a liar and . . . you couldn't believe anything he said." Neither Pugh nor Stratton replied. About 5 or 10 minutes later they got up, passed his table, and headed for the cashier. Pugh left the restaurant. Stratton returned to leave a tip and on his way out he said: "When you get back to work, I am going to get you, you turkey." When Bozarth looked up Stratton was walking through the exit.² He followed Stratton outside and asked what he meant by the statement. Stratton said: "You know what I mean . . . I'm going to get you when you get back." Bozarth then accused Stratton of lying about him in performance reports and invited Stratton to tell the investigator how he "had me." To which Stratton replied: "I've got you. That's why you're angry with me. . . ." Stratton then asked "if I was threatening to beat him up," and Bozarth replied: "No, I'm going to get you through the Board." Again Stratton stated: "I've got you." Bozarth ended the conversation by saying: "and the hell with you . . . you're nothing but a liar anyway." Bozarth claims he did not verbally abuse, threaten, or hit Stratton. The investigator arrived 5 minutes later. He took Bozarth's affidavit in regard to a charge (Case 9-CA-14928) filed 8 days earlier alleging that UPS, through Stratton, was harassing him for union activities and for filing other charges with the Board. The affidavit contains no references to the incident which had just occurred.³

Stratton states that he had been in Frisch's Restaurant since 8 a.m. having an informal "talk, listen, and action" meeting with driver Pugh. He had held similar meetings there with other drivers in the past. He noticed Bozarth enter the restaurant and on approaching a nearby booth the latter called out: "Hey, Jimmy, he ain't nothing but a liar, don't listen to what he has to say." He sat down and repeated the same comment. Shortly after 9 a.m. Pugh and Stratton got up to leave. Stratton is not aware of any comment from Bozarth as they passed his booth. As Stratton paid the check Pugh left to drive to the UPS building. Without returning to his table, Stratton went out to the parking lot. As he opened his car door, Bo-

zarth came outside and hollered at him: "Hey turkey, the man from . . . the labor relations board [is] coming over here to talk to me, how about sticking around and hearing what he has to say." Stratton replied that he was not interested and started to enter his car. Bozarth came up and pushed him back against the car with his shoulder, then kicked him in the shin, and put a lighted cigarette up to his eyes and said: "I'm going to burn your . . . mother fucking eyes out for lying on me." Stratton told Bozarth to get away or he would call the police, but the latter again threatened to burn Stratton's eyes out and called him more obscene names. Stratton said, "I mean it, I'm going to . . . call them if you don't get away from me." Stratton started the car but not before Bozarth shoved the door against his legs. He arrived at the UPS building at or about 9:20 a.m. and immediately told supervisors (Byrd and James) about the incident. On their advice he took the rest of the day off, after filing a report with the police. The latter circumstance is confirmed by a copy of a warning letter sent to Bozarth by the county's prosecuting attorney. Stratton denies having said he was going to "get" Bozarth either in the restaurant or in the parking lot.

Pugh testified under subpoena that his meeting with Stratton in the restaurant ended about 9 a.m. On leaving, he and Stratton passed Bozarth's booth and the latter said: "How many lies did he tell on Jimmy?" Pugh responded, jokingly, "Not more than two or three," and Bozarth said, "Sleazy Fucker." Pugh followed Stratton to the cashier, but did not wait with Stratton. Pugh left the restaurant immediately, drove to the UPS building, and clocked in at 9:15 a.m. When Stratton arrived, he was upset and nervous. He told Pugh that Bozarth had just threatened his life and had slammed the car door on his leg. He asked if Pugh would be willing to sign a statement. Pugh declined saying that he did not want to "tell anything against a union brother."

Center Manager Byrd and Division Manager James saw Stratton at the UPS facility just after the incident. Both stated that Stratton appeared to be visibly shaken, and had a red perforated bruise on his left shin. His description of the incident at that time was virtually identical to his testimony in this proceeding. James sent Stratton home for the day as "he was in no condition to keep working." Later in the day, James sent a letter to Bozarth advising him of a disciplinary hearing on the incident set for March 17, the date Bozarth was expected to return to work, as per a letter from his doctor dated January 31. He did not appear on March 17, allegedly because he had not received a release for work from his doctor. James rescheduled the hearing for March 20, and notified Bozarth by telegram dated March 17. Again Bozarth did not appear, nor did he attempt to communicate with James. Later that day, James advised Bozarth by telegram that his employment was terminated "because of your assault on supervisor Stratton."

Five persons employed by UPS at the Dayton facility testified that they did not trust Stratton and that he had a reputation as a liar. Of those, Howard goes further and states that Stratton, while riding with him on May 13, 1980, said he was going "to get my job the same way he

¹ In an affidavit given in connection with this case and signed on May 12, 1980, Bozarth stated: "When I walked in I noted UPS supervisor Chuck Stratton sitting in a booth with UPS driver Jimmy Pugh."

² In the affidavit signed May 12, Bozarth does not mention Pugh returning to leave a tip. Instead, he stated: "Within five minutes Pugh and Stratton got up to leave. I was reading my newspaper when Stratton walked by me and said, 'Bozarth, I'm going to get you when you get back to work.' I then looked up at Stratton who was at the door of the restaurant."

³ When asked on cross-examination whether he told the agent about the incident, Bozarth answered, "I believe I did. I can't remember, I'm pretty sure I did . . . if I remember correctly, I mentioned the incident to him." He explained the absence of any reference to the matter in the affidavit by stating that the investigator "didn't think it would matter or pertain to the affidavit that he was taking."

got Gayle Bozarth's." Howard asked him if that meant lying, and Bozarth smiled and said: "that's how I got Bozarth and if that's what it takes I'll get you."⁴

I credit Stratton. Bozarth, who is far more imposing physically than Stratton, appears deliberately to have chosen a booth near the one occupied by Pugh and Stratton. By his own admission he intruded upon them by calling Stratton a liar; and on leaving the restaurant he called him a "Sleazy Fucker." Bozarth's claim that Stratton said: "I'm going to get you" on returning to leave a tip is at variance with his earlier affidavit wherein Stratton is alleged to have made that statement promptly upon leaving his booth and at a time when a potential witness (Pugh) was nearby. Stratton's testimony that he was verbally and physically assaulted by Bozarth outside the restaurant is corroborated: (1) by his timely and consistent report of the incident to his supervisors and to the police; (2) by omission of any reference to the incident in an affidavit given by Bozarth to a Board investigator just after it occurred;⁵ and (3) by Bozarth's failure to appear at the UPS facility (even if he was unable to report to work for medical reasons) for the scheduled disciplinary hearing on the incident. I place no credence at all in witness Howard's asserted post discharge statement by Stratton regarding Bozarth; and this determination is based upon my observation of his demeanor, his obvious animus toward Stratton, and my analysis of the circumstances above relating to the incident at Frisch's.

I am aware that UPS has been found to have engaged in unfair labor practices in the recent past,⁶ particularly in a case⁷ wherein a driver operating out of its facility at Owensboro, Kentucky, was found to have been unlawfully discharged for protected activities, including participating in an organization (UPSurge) critical of both UPS and the Union in matters pertaining to drivers' wages, hours, and working conditions. For that reason, in making the credibility determinations above, I have considered, and have evaluated as insubstantial, other evidence which allegedly establishes that Stratton's testimony "is sheer fabrication" and part of an elaborate conspiracy to conceal the real reason for Bozarth's discharge, to wit: UPS's desire to "get him" for his involvement in protected activities. A brief recital and comment on that other evidence follows.

⁴ This conversation assertedly took place during an eventful day in which, among other things, Stratton (who is white) accused Howard (who is black) of spitting on him. Howard did not deny that possibility. Instead, he states that he had a sore throat and had been spitting all day, sometimes into the wind; and, in any event, Howard claims that Bozarth had repeatedly called him "boy," "trigger," and "lightening." On hearing their respective versions, Center Manager Byrd (who is black) advised them to stop the "pissing match" and do the job. No disciplinary action was taken.

⁵ I find it incredible that a Board agent investigating a charge alleging harassment of Bozarth by UPS, filed 8 days before the incident at Frisch's, would make the statement (see fn. 3) attributed to him by Bozarth.

⁶ See, for example, *United Parcel Service*, 247 NLRB 861 (1980); *United Parcel Service*, 241 NLRB 1015 (1979), enforcement denied 629 F.2d 173 (D.C. Cir. 1980).

⁷ *United Parcel Service*, 252 NLRB 1015 (1980).

B. Bozarth's Background

Bozarth has worked at UPS's Dayton facility as a driver since May 1971. He became involved with UPSurge in 1975 upon attending a meeting of that organization in Cleveland. Thereafter, he attended meetings in Indianapolis and Cincinnati, held meetings in his home, circulated and wrote articles for the organization's publication, and urged drivers to join UPSurge. He does not know how many of the 90 drivers at Dayton are members, but about 25 subscribe to the paper. In 1979 he ran unsuccessfully for the position of union steward. In addition, he has assisted other drivers in filing grievances, but his principal activity in that area has been the filing of numerous grievances and formal charges on his own behalf. Among the latter are:

1. A charge filed with the Ohio Civil Rights Commission (OCRC) on October 4, 1976, and with the Federal Equal Employment Opportunity Commission (EEOC) on November 29, 1976, alleging, among other things, that on October 1, 1976, a disciplinary action (resulting in a written reprimand and instruction to work as directed) was taken against him by Supervisor Byrd because of race and for filing two prior charges with OCRC. In pertinent part, the disciplinary action arose from an incident on September 27, 1976, when Bozarth was absent from a daily drivers meeting. When Byrd orally instructed him to attend, Bozarth's response was "If I [Byrd] didn't leave him alone, he was going to kick my ass."⁸ Upon investigation, the OCRC issued a report wherein it found no probable cause and dismissed the charge. The EEOC concurred in that determination.
2. A charge filed with EEOC on January 6, 1977 (and referred by that agency to OCRC), alleging harassment and intimidation by UPS because of race and filing of prior charges with OCRC and EEOC. The charge specifically referred to a disciplinary action on December 29, 1976, resulting in a 5-day suspension for failing to follow instructions and insubordination, which was later reduced to 3 days by an appeal panel under contractual grievance procedures. Byrd had initiated the action after riding with Bozarth for 2 days. The OCRC found no evidence to substantiate either allegation and dismissed the charge.
3. A charge (Case 9-CA-14065-1) filed with the Board on July 3, 1979, alleging in part, that on or about July 2, 1979 (June 29, in fact), a disciplinary action (resulting in a 2-day suspension, later reduced to 1 day by an appellate grievance panel) was taken against him because of his activities in behalf of the Union and for purposes of harassment and coercion. This disciplinary action related to conduct of Bo-

⁸ On the morning of October 1, 1976, shortly after he had been disciplined, Bozarth, driving his privately owned yellow van, attempted three times to force former Supervisor Rainey off the road. Earlier that year, Rainey had ridden with Bozarth for a 14-day period of on-the-job supervision. Bozarth denies that the incident occurred. Based upon his detailed account and apparent candor, I credit Rainey.

zarth on a "feeder run" between Dayton and Indianapolis. He was in the cab with Nalley (his then supervisor) and the latter was attempting to demonstrate ways of reducing Bozarth's driving time by one-half hour. Bozarth viewed Nalley's very presence in the vehicle as harassment and, among other things, voiced his displeasure by repeatedly using the citizen's band radio to urge the "smokies" and other drivers to "pull this turkey off the road for speeding."⁹ Bozarth states that he did so only in Indiana where he believed the police did not monitor CB calls. Upon investigation, the Regional Director dismissed the charge (Sub. No. 1) upon a finding of insufficient evidence. That determination was upheld on appeal.

4. A charge (Case 9-CA-14578) filed with the Board on November 21, 1979, alleging that, since November 9, UPS had discriminated against him to discourage membership in the Union by refusing to assign him to a temporary parcel route and, instead, assigned it to a driver of lesser seniority. After interpreting the applicable collective-bargaining agreement, the Regional Director declined to issue a complaint and dismissed the charge finding that UPS had acted properly under the contract and that there was no evidence that it took any action in this matter because of his activity in filing grievances or for any other reason proscribed by the Act. That determination was upheld on appeal.

Bozarth could not point to any specific instance in which he had been questioned or disciplined for filing grievances or aiding others to do so, although he did recall that on one occasion he had talked to Nalley about filing a grievance and the latter replied: "I'm sure you will. You are famous for filing grievances." Further, he concedes encountering no difficulty in obtaining time off from work (in October 1979) to present a petition to Congressman Hall. Supervisor Byrd simply asked what it was about and Bozarth replied saying: "It was a means of getting you off my ass." The petition had "a few" signatures, was highly critical both of UPS and the Union, and asked for a congressional investigation.

C. On-the-job harassment

Stratton became supervisor of one of the four package car sections in the Dayton Center of UPS on January 1, 1980. Sixteen drivers, including Bozarth, were employed in that section. Of 118 package car sections in UPS's midwest region, Stratton's section then ranked 117 in terms of cost efficiency under norms applied generally by the Company. He was made aware of that situation by both Byrd and James and understood that he was expected to achieve significant improvements. During the first week in January he analyzed the daily operating reports of all drivers in his section, and established performance improvement goals for each driver. In particular, he determined that Bozarth's route required a maximum of 8 hours running time, that Bozarth was exceed-

ing that time by a daily average of 2-1/2 hours (for which he was paid overtime), and that Bozarth was "least best" in relation to other drivers in the section. Accordingly, he decided to devote his initial efforts to on-the-job supervision (OJS) of Bozarth. This commenced in mid-January and continued for 14 consecutive days until Bozarth incurred an injury on January 30. During the OJS he insisted upon strict observance of company methods designed to assure most efficient use of time. These range from minute details (e.g., having the ignition key in hand when reentering the vehicle, having COD stubs readily available in a certain pocket) to more obvious ways of saving time (e.g., walking at a fast pace when making deliveries, prechecking the vehicle to insure against breakdowns). At the end of each day, Stratton wrote out a performance report on Bozarth listing good as well as bad points, and he discussed the reports with Bozarth. The basic problems were inconsistency (things Bozarth did right one day were performed badly on the next), and hostile attitude ("he kept telling me to get off his ass"). On at least two occasions Stratton told Bozarth to improve his performance or "its my job or your's, and it's not going to be mine." Bozarth's average daily overtime was reduced to 1 hour and 40 minutes during the first 7-day period of OJS and to 1 hour and 32 minutes during the second. After Bozarth's injury Stratton rode successively with eight other drivers. Most required only 1 day of OJS, although one (Howard) required 3. At the end of the first quarter of 1980, costs in Stratton's section had been reduced by \$200 per day, and its ranking improved to eighth in the region. In July, Stratton was transferred to the UPS Center at Springfield, Ohio, as acting center manager, and he served in that capacity until late September when he was appointed manager of the UPS Center in Piqua, Ohio.¹⁰

Bozarth did not dispute his rating as "least best." Rather, he claimed that the 8-hour maximum running time was unrealistic since he had been driving the route for only 5 months compared to 4 years for his predecessor. He considers the latter circumstance, together with a number of Stratton's "nit-picking" criticisms of his performance during OJS (e.g., forgetting to check his windshield wipers, not polishing his shoes, not fastening his seat belt, and occasionally not delivering a stop), and the very length of that supervision as establishing a pattern of harassment. I disagree. Faced with a serious productivity problem, Stratton evaluated the performance of all drivers in his section before establishing new norms; and, as "least best," Bozarth was logical first choice for OJS. I view the length and quality of that supervision as indicative more of Stratton's patience (he would ride with each driver, "as long as necessary") than of any intent to harass. Moreover, there is no showing that Stratton fo-

⁹ Using his watch, Bozarth had calculated that the vehicle at times had traveled a mile in 6 seconds over the time required for a speed of 55 mph.

¹⁰ Stratton claimed that the Center at Springfield received UPS's "Most Efficient Center" trophy for efficiencies achieved while he was acting center manager. It appears, however, that the award was given for performance at the Springfield Center during the second quarter of 1980 and before Stratton arrived. I regard that errancy as in the nature of a "white lie" or "puffing," and not of sufficient magnitude to cast serious doubt on his overall credibility or on his version of the incident at Frisch's.

cused his attention on Bozarth for any reason other than to improve his performance. In that regard several co-workers, while stating their belief that Bozarth was being harassed, also indicate that methods evaluation and OJS are means normally employed by UPS supervisors to increase the efficiency of drivers perceived to be substandard performers. None assert that their use was directed against Bozarth because of his activism or involvement with UPSurge.

In an effort to impeach Stratton's credibility, Bozarth cited three occasions when, assertedly, Stratton falsely accused him of deliberate delays: once when he said "I walked all the way to the end of a block to make a delivery, when I had walked only 50 feet"; another occurred when "after I missed a stop, he said I drove to the end of the street before turning back, but the street was a short one ending in a cul-de-sac and, in any event, I used the first available driveway for turning around; and the third was when "he accused me of driving 35 miles per hour over a 6-mile stretch on an Interstate Highway." In my view the situations described in the first two instances above involve mere differences of opinion; and on the question of credibility involved in the third, I credit Stratton.

An effort was made to show the existence of a conspiracy by UPS management against activist employees through the testimony of Harding, a former supervisor who had been discharged on February 28, 1980. I find his testimony unpersuasive. In substance, he states that between 1977 and 1980 he attended numerous monthly meetings of supervisors, usually at the Ramada Inn in Dayton. In addition, there were "Management by Commitment" and "Team Management" meetings. He attended only one meeting of the latter type, and that was 2 or 3 years ago. Present were district, divisional, and regional managers, a "few" other supervisors, someone from Detroit and someone else from Kentucky. There was a discussion of why his center was not achieving minimum requirements. The supervisors were asked to list the good and bad points of drivers in their sections and were told to work with the ones having the most bad points by using "peer influence." Also, there was a discussion about what could be done "to get drivers who were problems . . . either to do the job or get rid of them." Drivers were problems if "maybe they were outspoken against company policy, [or] maybe we felt that they weren't doing the job the way it should have been done, things like that." In particular, two employees were discussed, Steve Wick and Don Crawford. Harding was unable to recall exactly what was said. "It was either to do their job or get them out of the company." But no direct advice was given. He states: "Maybe you know in the way it was presented we knew what we could do," and cites as an example his seeing a problem employee

on the dock. In that situation "you might overreact . . . and say: hey, you're not supposed to be on the dock . . . and if they didn't leave . . . you would tell them they were fired." He took notes at the meetings he attended over the 3-year period. Notes containing "stuff . . . that shouldn't be read by the employees" were supposed to be locked up in a filing cabinet for security reasons. He does not remember what was in his notes. He states that they "may" have contained references to harassment of employees. At the Team Management meeting nothing was said about employees who were assisting other employees in filing grievances. He recalls that management sometimes referred to the latter disparagingly as "leaders." There was a discussion of methods evaluation, that is "When you go out with the drivers for three days and see how he applies his methods according to company policy and the way he has been instructed to perform."¹¹ Also he overheard a "Steve Finnelly" tell Supervisor Burley "that he should crack down on Steve Wick and either get him to do the job or get rid of him." Harding believes that Wick and Crawford are no longer employed by UPS and that they either quit or were fired after being "ridden with quite a lot." Bozarth was never discussed by any member of management in his presence. He is aware that Stratton rode with Bozarth, and once Stratton told him that Bozarth "was either going to do it [the job] or he was going to get rid of him." In response to the the question: "Was it ever discussed in your presence in the last 12 months by members of management that there were certain employees that were regarded as leaders?" Harding responded: "No, I don't believe so." He was never told by management that certain employees were to be disciplined.

In my opinion, Harding's testimony provides nothing better than innuendo upon which to base a finding that UPS harassed or otherwise disciplined employees engaged in protected activities. He could not recall what was said at any of the many meetings he attended over a 2- or 3-year period. Instead, he conveys only his impression that management regarded dissident employees with disfavor and would countenance pretextual discharge of "problem employees" including dissidents, who did not get the job done. His vagueness was not due to reticence. He was voluble on the witness stand and under no apparent constraint since he was no longer employed by UPS. I conclude that he simply did not have any hard facts.

¹¹ Harding's response concerning methods of evaluation was elicited by an egregiously leading question, i.e., "Anything else said at that meeting about ways of getting rid of employees other than harassment?" The witness had not used the word "harassment" and the question assumes conclusion of law. Accordingly, I discredit any implication in the response that UPS management encouraged getting rid of employees through harassment or methods evaluation.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS
OF LAW

I find that Bozarth perpetrated an unprovoked assault on his supervisor, that he was discharged solely for this reason; that there is no evidence of toleration of such conduct by other UPS employees or that UPS normally invokes a lesser discipline therefor than discharge; and that Bozarth was discharged for cause. Accordingly, I conclude that UPS has not violated the Act in any respect alleged in the complaint.

On the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹²

The complaint is hereby dismissed in its entirety.

¹² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.